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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the matter of)
)
Advanced Television Systems)
)
and Their Impact Upon the)
Existing Television Broadcast Service)

MM Docket No. 87-268

OPPOSITION TO
PETITION FOR RECONSIDERATION AND CLARIFICATION
(MAP *et al.*)

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July 18, 1997

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**OPPOSITION TO PETITION FOR
RECONSIDERATION AND CLARIFICATION**

The Association of Local Television Stations, Inc. ("ALTV"), hereby opposes the Petition for Reconsideration and Clarification of Media Access Project ("MAP") *et al.* ("MAP Petition"), filed June 16, 1997, with respect to the Commission's *Fifth Report and Order* in the above-captioned proceeding.¹ ALTV is a non-profit, incorporated association of broadcast television stations unaffiliated with the ABC, CBS, or NBC television networks.²

The MAP petition essentially faults the Commission for failing to adopt new "enhanced" public interest obligations for digital television ("DTV"), failing to require that digital television applicants demonstrate their financial qualifications, and even for granting free extra spectrum to a broadcast industry which supposedly has rejected its public interest obligations. MAP *et al.* also ask the Commission to "clarify" that public interest obligations apply to both free and subscription television services.

¹FCC 97-116 (released April 21, 1997), 62 *Fed. Reg.* 26966 (Friday, May 16, 1997) [hereinafter cited as *Fifth Report and Order*].

²ALTV's membership includes not only truly independent stations, but also local television stations affiliated with the three emerging networks, Fox, UPN, and WB. ALTV's membership includes both VHF and UHF stations.

None of MAP *et al.*'s requests has merit. At the outset, allegations that the broadcast industry has "rejected" its obligation to operate in the public interest are misplaced and misguided. Such reckless statements constitute no more than an unwarranted assault on the substantial ongoing efforts of numerous responsible licensees whose stations are integrated into the lives of their communities in an exemplary fashion. Do MAP *et al.* recite a litany of specific shortcomings on the part of any station? Do they point to petitions to deny renewals based on allegedly deficient efforts by licensees? No! They seize upon the rhetoric of industry leaders and lawyers in briefs and speeches. Rhetoric, perhaps, is the proper premise for an argument which itself constitutes no more than rhetoric -- and quite hollow rhetoric at that. Suffice it to say, otherwise, a blanket accusation on the order of MAP *et al.*'s demands far more basis than MAP *et al.* have provided before it enjoys even a modicum of credibility.

MAP *et al.* also attempt to place an ill-supported gloss on the language of the Telecommunications Act of 1996 ("the Act") in support of its assertions that new spectrum and new technology somehow translate into new obligations. In their view, three sections of the Act require the Commission to adopt "new public interest requirements commensurate with the new opportunities provided by digital transmission...."³ None of the provisions cited by MAP *et al.* suggest anything of the kind. First, Sections 336(a) and (b) speak only to ancillary and supplementary services provided via DTV. Section 336(b) refers to regulations adopted pursuant to Section 336(a). 47 USC §336(b). Section 336(a) refers only to "regulations that allow the holders of [DTV] licenses to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity." 47 USC §336(a). These provisions have nothing to do with regulation of programming on a DTV station's main free

³MAP Petition at 7.

broadcast channel and confer no authority or obligation on the Commission's part to adopt any new or specific public interest programming requirements for DTV services.⁴

Second, Section 336(d) is equally silent *vis-a-vis* any new or specific public interest programming requirements for DTV services. It says no more than that nothing in Section 336 may be construed as relieving a station from its obligation to operate in the public interest. The "obligation" to which the section refers only may refer to the existing well-established obligations of stations under the Communications Act. No new obligation is specified in the statute to which the reference otherwise conceivably might apply. Furthermore, how could a station be relieved of an obligation which does not yet exist?

Third, MAP *et al.*'s contention that "[i]t would have been unnecessary for Congress to adopt these provisions had Congress merely intended the Commission to extend current public interest obligations to digital television" defies the plain language of the statute.⁵ With respect to DTV services, Congress said nothing more than that broadcasters were not relieved of their current public interest obligations. Whereas MAP *et al.* might consider it unnecessary to restate this, Congress could and did choose to do so in plain, unambiguous language.⁶ This hardly supports the proposition that Congress really must have intended something more.

⁴MAP *et al.*'s argument that subscription program services should be subject to public interest obligations also is devoid of support from these provisions. That the Commission should adopt regulations applicable to ancillary or supplemental services "consistent with the public interest, convenience, and necessity" hardly breaks new ground. It simply restates that the Commission, as always, is to regulate in the public interest. No thought of new or more specific public interest requirements may be extracted from this boilerplate public interest clause.

⁵MAP Petition at 8.

⁶MAP *et al.* points to nothing Congress may have opined about the necessity of referring to broadcasters' existing public interest obligations. Instead, it notes only the Commission's interpretation of the Act. MAP Petition at 8.

Furthermore, what *MAP et al.* yearn for would defy the fundamental limits on the Commission's authority to adopt specific and/or exacting public interest programming requirements. The Communications Act tolerates only very general Commission oversight of broadcasters' programming performance. As recognized by the Court in *CBS, Inc. v. Democratic National Committee*, "Government power over licensees ... is by no means absolute and is carefully circumscribed by the Act itself."⁷ The Court then spoke much more particularly to the limits of government control over broadcast programming:

Congress has affirmatively indicated in the Communications Act that certain journalistic decisions are for the licensee, subject only to the restrictions imposed by evaluation of its overall performance under the public interest standard.⁸

The Court reiterated that a station licensee is "held accountable for the totality of its performance of public interest obligations."⁹ More recently, in *Turner Broadcasting System, Inc., v FCC*, the Court pointedly disavowed the notion that the Commission could control content of broadcast programming:

In particular, the FCC's oversight responsibilities do not grant it the power to ordain any *particular type of programming that must be offered* by broadcast stations; for although "the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear."¹⁰

⁷412 U.S. 94, 126 (1972) [hereinafter cited as *CBS v. DNC*].

⁸*CBS v. DNC*, 412 U. S. at 120.

⁹*CBS v. DNC*, 412 U.S. at 121.

¹⁰114 S. Ct. 2445, 2463 (1994) [emphasis supplied]. One might observe that the Court's statement is doubtfully more than a half-step removed from calls by industry leaders to get the government out of broadcast programming.

Noncommercial licensees, like their commercial counterparts, need only adhere to the general requirements that their programming serve 'the public interest, convenience or necessity.'¹¹

Therefore, in calling for more specific obligations, MAP *et al.* is asking the Commission to exceed its authority.

Even assuming *arguendo* that the Commission had such authority, the adoption of new, specific requirements for DTV stations would be premature and counterproductive. DTV is a great unknown in many respects, including the nature of programming and services to be provided. Rigid rules would hamper the sort of experimentation in programming and services which stations will undertake to find the markets for their new services and provide programming and services which consumers find valuable and responsive. An open competitive environment in which each licensee may provide programming and services in response to its basic public interest obligation is far more likely to foster development of a rich new array of imaginative programming and services than a regulatory regime which forces stations to proceed in lock step with their competitors. In the latter circumstance, the government would be defining consumer needs and tastes and forcing all stations to provide the same types of programming and services, regardless of how consumers define their need when left to their own devices.¹² Thus, MAP *et al.*'s demand for new public interest requirements on DTV programming and services would stifle the development of new and exciting means of responding to stations' obligations to serve the public interest.

MAP *et al.*, therefore, map out for the Commission a perilous course which would offend not only the Commission's statutory mandate, but also the common sense values reflected in the statutory limits on the Commission's authority over broadcast programming and services. The

¹¹Turner, *supra*, 114 S. Ct. at 2463.

¹²Dare ALTV say that more consumers will watch the Olympics than would watch a half-hour talking head roundtable about a referendum to build a new sports arena in a community?

Commission, consequently, must maintain its course and do no more than apply the existing broadly stated public interest obligations to licensees' new DTV facilities.

MAP *et al.*'s request that DTV applicants be required to demonstrate their financial qualifications similarly has no place in the scheme of regulation for DTV. Beyond needlessly exposing highly proprietary station financial information to competitors, such a requirement would invite delay in the licensing of DTV facilities. Objections to the grant of new DTV construction permits -- based on quibbles about the adequacy of financial showings -- could tie up processing and Commission resources endlessly. Moreover, because stations must complete construction according to a strict timetable established by the Commission, the risk involved in assuming the financial qualifications of existing broadcast licensees which decide to apply for DTV facilities is limited. MAP *et al.* also must be aware that an application filed in bad faith for the purpose of "warehousing" a frequency would constitute an abuse of the Commission's processes and a misrepresentation which would lead to sanctions against the perpetrator. In the case of a broadcast licensee, sanctions could include a disqualification from being a licensee. MAP *et al.*'s proposal, therefore, would be no more than a burdensome and destructive paper-work requirement which would serve only to solve a problem already substantially solved by the Commission's present rules and policies.

Finally, MAP *et al.*'s insistence that the Commission clarify that subscription services are subject to public interest obligations is fundamentally out-of-synch with the legal and policy constraints on the Commission's involvement in supervising new non-broadcast DTV services. As noted above, 'tis a far cry from requiring that the Commission's rules for ancillary and supplementary services be consistent with the public interest and a statutory mandate to apply public interest programming obligations to subscription services.¹³ Furthermore, such

¹³See n.4 , *supra*.

requirements would be unnecessary and counterproductive. If a broadcaster wishes to experiment with a *non-broadcast* service as one of several SDTV program services transmitted on the DTV channel, no need exists to apply the present public obligations to that service. First, the station's core free broadcast service (as well as its NTSC channel) will remain subject to broadcasters' basic public interest obligations. The public will continue to be able to rely on stations' free video service, which must be responsive to its needs and interests and which must comply with rigid requirements in handling political broadcasts and indecent programming.

Second, application of service-molding public interest requirements to new, innovative non-broadcast program services would only stifle the development of such services. Indeed, the Commission has refused to saddle subscription television and direct "broadcast" satellite service with the obligations which now attach to free broadcast television service.¹⁴

Third, the proverbial *quid pro quo* relationship between free use of spectrum and fulfillment of public interest obligations will not exist when broadcasters use DTV capacity to provide nonbroadcast services. Broadcast licensees engaged in nonbroadcast services on their DTV facilities apparently will be paying fees for the spectrum used for such services.¹⁵

Thus, ALTV reiterates that public interest obligations and requirements need not and ought not apply to nonbroadcast services offered by broadcast licensees via their DTV facilities.

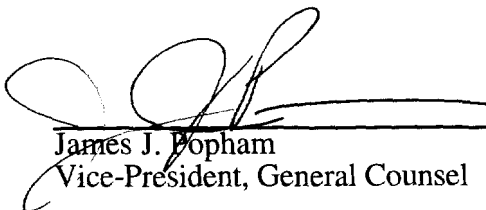
MAP *et al.*'s petition, therefore, deserves no serious consideration. Lacking any sound basis in law, policy, or fact, it should be denied out-of-hand.

¹⁴See *Subscription Video*, 1 FCC Rcd 1001, 1005-06 (1987).

¹⁵See 47 USC 336(e).

In view of the above, ALTV urges the Commission to deny the MAP *et al.* petition for reconsideration.

Respectfully submitted,



James J. Popham
Vice-President, General Counsel

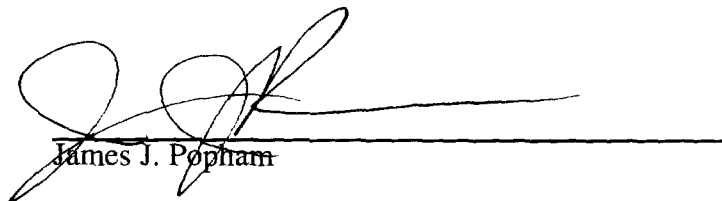
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July 18, 1997

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Opposition to Petition for Reconsideration and Clarification" were served on this 18th day of July, 1997, via first class mail, postage prepaid, upon the following:

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